No. 12047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARLE C. ANTHONY, INC.,

Appellant,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD.,

Appellees.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal by Earle C. Anthony, Inc., plaintiff below, hereinafter referred to either as "appellant" or as "KFI," from a judgment of dismissal, following motions to dismiss appellant's complaint. Said judgment was entered in the District Court of the United States for the Southern District of California, Central Division.

Jurisdiction.

Appellant's complaint in paragraph I thereof [R. 2] sets forth the Constitutional and Federal questions raised by the action. Jurisdiction of the District Court is predicated on the Civil Rights Act, U. S. C. A., Title 8, Sections 41, 43 and 47(3), and on Title 28, Sections 41 (1), (8), (12), (13), and (14). This Court has appellate jurisdiction under Title 28 U. S. C. A. Section 225a.

Statement of the Case.

The complaint [R. 2-12] alleges in substance: Appellant is a California corporation, the owner and operator of radio station KFI in Los Angeles. It has invested in said station in excess of $1,500,000.00, and during the past 25 years has built up one of the largest listening audiences of any radio station in the Western States. The station has a transmission power of 50 kilowatts and its programs are heard in interstate and foreign commerce [R. 3].

Appellee, Kenneth E. Morrison, is and was a Superior Court Judge in Orange County, California [R. 3]. Appellee, The Voice of the Orange Empire, Inc., Ltd. (hereinafter referred to as KVOE), is a California corporation and the owner and operator of radio broadcasting station KVOE located at Santa Ana, in Orange County, California [R. 3-4].

KFI and KVOE are competitors. Each broadcasts news, entertainment, educational and similar type programs. The chief asset of each station is its listening audience good will. KFI has over a period of 25 years established a reputation for its prompt and accurate news reporting which has contributed to its success in attracting and maintaining a large listening audience [R. 4-5].

In 1947 Walter and Beulah Overell were killed on their yacht in Newport Beach, California, and subsequently Louise Overell, daughter of the deceased, and George R. Gollum were charged with the murder of the Overells. Their trial before Judge Morrison lasted in excess of

19 weeks and was widely publicized, both in the press and on the radio [R. 5].

Judge Morrison gave permission to KVOE to locate a microphone in his courtroom and to broadcast the trial [R. 6].

On October 4, 1947, the case had been submitted to the jury and KFI made a request of Judge Morrison for permission to broadcast the verdict from the courtroom on the same terms and conditions as he had granted to KVOE. Permission was refused, the Judge stating he was granting exclusive permission to KVOE, and justified his refusal on his authority to control his courtroom [R. 6-7].

KFI renewed its request on three separate occasions but each request was denied. When the verdict was announced, it was broadcast from the courtroom by KVOE. KFI had committed no acts that would justify the Judge in believing that if admitted to the courtroom it would create a disturbance, or interfere with the orderly conduct of the trial, and in this connection requested permission to connect its microphone into wires of KVOE outside the courtroom [R. 7-8].

On being denied the privilege of broadcasting from the courtroom, KFI requested of the Judge permission to broadcast from a location about 300 feet from the courtroom on a bridge connecting the Courthouse to an adjacent building. The Judge stated that this location was entirely without his jurisdiction and that so far as he was con-

cerned, such a broadcast could be made. Pursuant to this statement and with permission of the building custodian, KFI set up its microphone on the bridge. Approximately simultaneously with the reading of the verdict, a courthouse janitor, acting under orders of Judge Morrison, seized KFI's microphone, thereby preventing the making of a broadcast, and with the aid of two deputy sheriffs, placed KFI's engineer in restraint [R. 8-9].

In addition to KVOE, special permission was granted to "Station of the Stars, Inc.," a corporation operating radio station KMPC in Los Angeles, California, to locate its facilities in Judge Morrison's chambers and to connect its facilities to KVOE, thereby enabling KMPC to relay KVOE's broadcast [R. 9].

Damages to KFI in the sum of $150,000.00 were alleged [R. 10].

A second cause of action realleged the foregoing facts and contained appropriate allegations of conspiracy between KVOE and Judge Morrison to deprive and to deny KFI access to the courtroom and the right to broadcast [R. 10-12].

Motion to Dismiss was filed by Appellee The Voice of the Orange Empire, Inc., Ltd. [R. 13-14], and Appellee Morrison appeared on the motion and joined therein [R. 14]. After hearing, the Honorable Judge of the District Court wrote a Memorandum Opinion [R. 15-18], and a Judgment of Dismissal was entered [R. 19-20] from which this appeal is taken [R. 20].

Specifications of Error Upon Which Appellant Will Rely.

The District Court erred in entering a Judgment of Dismissal for the reasons that the facts alleged in said complaint are within the jurisdiction of the Federal District Court, the Federal District Court had jurisdiction over the subject matter and the complaint states a cause of action against appellees.

Issues Involved.

(1) Whether the complaint on file stated a cause of action against appellees and each of them.

(2) Whether the causes of action stated in plaintiff's complaint are within the jurisdiction of the Federal District Court.

(3) Whether the complaint on file stated a cause of action for conspiracy against appellee to deprive appellant of its right to freedom of the press, equal protection of the laws, its property, without due process of law, and of its right to engage in interstate and foreign commerce.

(4) Whether a judge of a state court is an instrumentality of the state and whether a judge so acting in his official capacity can grant special privileges to one news-gathering agency to the exclusion of others.

Summary of Argument.

It is the position of appellant that the right to news, that is the right to obtain news, is a property right and as such is entitled to equal protection and application of the laws. A judge of a state court when sitting in his official capacity as a judge is an officer of the state—an instrumentality thereof. While acting in his official capacity, a judge must not discriminate, and if he grants favors, privileges and rights to one person, of the same class, he is barred by the Constitution to deny the same rights, favors and privileges to others of the same class. Where one, a judge in this instance, denies to a person of a class any right, privilege or immunity, he is liable to that person, and that person has a cause of action under the Civil Rights Act (8 U. S. C. A. 41, 43).

We shall develop this argument under the following headings:

I.

THE COMPLAINT ON FILE STATES CAUSES OF ACTION AGAINST APPELLEES AND EACH OF THEM.

II.

THE CAUSES OF ACTION STATED IN THE COMPLAINT ARE WITHIN THE JURISDICTION OF THE FEDERAL COURT.

ARGUMENT.

I.

The Complaint on File States Causes of Action Against Appellees and Each of Them.

1. The Complaint States a Cause of Action for Damages.

Preliminary Discussion:

This case is believed to be one of first impression. It presents the right of freedom of speech and of the press as applied to news-gathering agencies from the aspect of freedom from restraint as to sources of news. The right to protection to news after it has been collected has been established by the Supreme Court of the United States in *International News Service v. Associated Press,* 248 U. S. 215, 63 L. Ed. 211. The right to disseminate news once collected has long since been established. (See by way of illustration *Grosjean v. American Press Company, Inc.,* 297 U. S. 233, 80 L. Ed. 660.)

This case involves protection to news-gathering agencies to their sources of news, and its importance perhaps transcends all other aspects of the problem of freedom of speech and the press, for when the sources of news are strangled, the right to ownership of news, and the right to disseminate news, are rendered of no importance, for when the source is dried up, subsequent safeguards but protect a hollow shell.

It is most unfortunate that in the present case a judge is involved. Courts are considered as the bulwarks of justice, and as that part of our government where fairness is paramount and where all persons are judged equal and treated as equals before the law. Here the acts com-

plained of were not judicial acts, but were acts of a judge in his executive or ministerial capacity, in his capacity as the moderator of his courtroom. The deprivation of rights here before the Court are similar to those that would follow if a Board of Supervisors should bar certain press services from its public hearings but permit access to others.

Discussion:

A. The Question of the Interest Involved.

The Honorable District Court in its Memorandum Opinion [R. 15-18] took the position that the matter before it did not involve a right or privilege protected by the Federal Constitution or laws, and therefore granted the Judgment of Dismissal. This approach assumes that as a prerequisite to any action for deprivation of a civil right, the right involved for which protection is sought must be one granted by a specific law or by a specific provision of the Constitution. While it is not questioned that the "rights, privileges, or immunities" made the subject of litigation must be "secured by the Constitution and laws" (8 U. S. C. A. 43), there is, we submit, a vast difference between the approach taken by the District Court and the rule to be found in the decisions of the Supreme Court with reference to the Constitutional issues at stake.

It is, of course, conceded that a judge of a trial court is not precluded from denying to all radio broadcasters the right to broadcast from his courtroom. No case has held that the right to a public trial means trial over the radio. There is no statute or law requiring a judge to open his court to radio broadcasting. If we understand the position of the District Court, it is in effect, that unless there were

such a law, appellant could have no standing in a Federal Court under the Civil Rights Act. However, it is equally true that there is no law that forbids a trial court from opening its trials to broadcasts. We thus have an area in which the Judge himself is vested with discretion; he, as Judge, as the sole legislator in this restricted area, determines whether or not broadcasting is to be permitted. In the instant case Judge Morrison decided to permit radio broadcasting. The effect of his decision is that the Judge gave a right which invoked the equal protection of the laws amendment to the Constitution. In the limited sphere of his courtroom he created a legal situation which prohibited him from unreasonable discrimination against any member of the same class to which the privilege was granted.

We believe the Supreme Court settled any doubt as to this issue by its decision in *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 90 L. Ed. 586.

Congress, by statute, divided mailable matter into four classes. Esquire magazine, as a periodical, fell into the second class. The Postmaster General sought to deny to Esquire the right to avail itself of the second-class permit on the ground that it contained obscene material. The second-class mailing privilege was found to be worth $500,000.00 a year to the magazine.

The Supreme Court pointed out that the second-class privilege was in the form of a subsidy, and said (90 L. Ed. 589, at p. 592):

> "We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. The categories of publications entitled to that classification have indeed varied

> through the years. . . . But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in United States, *Ex Rel.* Milwaukee, S. D. Pub. Co. v. Burleson, 255 U. S. 407, 65 L. ed. 704. . . . Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated."

The opinion of Mr. Justice Brandeis cited with approval in the *Esquire* decision, arose in a case where the majority of the Court had ruled that the Postmaster General could deny the second-class mail privilege to a paper publishing articles that offended against the Espionage Act. (*United States Ex Rel. Milwaukee S. D. Pub. Co. v. Burleson,* 255 U. S. 407, 65 L. Ed. 704.) The same argument as that under question here was made in the *Burleson* case and Mr. Justice Brandeis disposed of it as follows (p. 715):

> "There is, also, presented in brief and argument, a much broader claim in support of the action of the Postmaster General. It is insisted that a citizen uses the mail at second-class rates not as of right, but by virtue of a privilege or permission, the granting of which rests in the discretion of the Postmaster General. Because the payment made for this governmental service is less than it costs, it is assumed that a properly qualified person has not the right to the service so long as it is offered; and may not complain if it is denied to him."

The opinion then develops the source of the right, namely, Congress, which set up the classification. It was pointed out that the Postmaster General's sole function was to determine whether the periodical in question qualified under the classification. To say that the statute gave a discretion to the Postmaster General would, according to the opinion, page 717,

> ". . . raise not only a grave question, but a 'succession of constitutional doubts,' as suggested in Harriman v. Interstate Commerce Commission, 211 U. S. 407, 422, 53 L. ed. 253, 264, 29 Sup. Ct. Rep. 115. It would in practice seriously abridge the freedom of the press. Would it not also violate the 1st Amendment? It would in practice deprive many publishers of their property without due process of law. Would it not also violate the 5th Amendment? It would in practice subject publishers to punishment without a hearing by any court. Would it not also violate article 3 of the Constitution? It would in practice subject publishers to severe punishment for an infamous crime without trial by jury. Would it not also violate the 6th Amendment? And the punishment inflicted—denial of a civil right—is certainly unusual. Would it also violate the 8th Amendment? If the construction urged by the Postmaster General is rejected, these questions need not be answered; but it seems appropriate to indicate why the doubts raised by them are grave."

Referring to the power of the Government, it was said (p. 717):

> "The government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and it would not thereby abridge the freedom of the press,

since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service, and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression. . . ."

(P. 718):

"The right which Congress has given to all properly circumstanced persons to distribute newspapers and periodicals through the mails is a substantial right. Hoover v. McChesney, 81 Fed. 472; Payne v. United States, 20 App. D. C. 581, 192 U. S. 602, 48 L. ed. 583, 24 Sup. Ct. Rep. 849. It is of the same nature as, indeed, it is a part of, the right to carry on business which this court has been jealous to protect against what it has considered arbitrary deprivations. Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L. R. A. 1915C, 960, 35 Sup. Ct. Rep. 240; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. A law by which certain publishers were unreasonably or arbitrarily denied the low rates would deprive them of liberty or property without due process of law; and it would likewise deny them equal protection of the laws."

Averting again to the contention that a privilege and not a right was involved, Justice Brandeis said (p. 718):

> "The contention that, because the rates are non-compensatory, use of the second-class mail is not a right, but a privilege, which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation."

The analogy of this case to the present case is, we submit, exceedingly close. It requires no exposition to establish that when Judge Morrison granted to KVOE the right to broadcast from his courtroom that he granted to KVOE a thing of value. This was a grant of a right to a source of news directly at its fountainhead. It is unimportant, as pointed out by Mr. Justice Brandeis, that this may have been a gratuity. If so, it was paid for by the taxpayers of the State of California. Nevertheless, it was a grant of a thing of value given to one citizen and denied to another of the same class.

Illustrative of this particular point is the case of *Danskin v. San Diego Unified School District,* 28 Cal. 2d 536.

Under Section 19431 of the Education Code of California, a School Board may authorize the use of school buildings for certain purposes. Section 19432 of the Education Code prohibited a use by organizations that advocated overthrow of the Government. Pursuant to this statute, the School Board of San Diego opened one of its High School Auditoriums to public meetings. The San Diego Civil Liberties Committee was denied the use of the building upon the refusal of their applicant to sign

an affidavit that he did not advocate and was not affiliated with any organization that did advocate overthrow of the Government by violence. Mandamus proceedings were brought to compel the School Board to grant the use of the building free of this condition.

The Supreme Court of California said (p. 545):

> "The state is under no duty to make school buildings available for public meetings. (See 86 A. L. R. 1195, 47 Am. Jur. 344.) If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings."

The Court went on to say that there was a parallel between the privilege in question and the privilege of using the mails at less than costs and it then proceeds to discuss *Hannegan v. Esquire,* and the dissent of Mr. Justice Holmes in the *Burleson* case. Again, on page 547, the Court emphasized that the state need not open its school buildings, but once it does it must not discriminate, saying:

> "It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable. Censorship of those who would use the school building as a forum cannot be rationalized by reference to its setting. School desks and blackboards, like trees or street lights, are but the trappings of the forum; what imports is the meeting of minds and not the meeting place."

In considering the question of whether the Board of Education of Visalia could authorize a social dance in the high school, the Court said, in *McClure v. Board of Education,* 38 Cal. App. 500, at page 504:

> ". . . the schoolhouse, . . . , must, of course, be used for a public purpose, and that purpose must have some relation to the educational or recreational needs of the community. . . .
>
> "It is equally plain that the Board would have no authority to grant an exclusive privilege to any of the citizens to use said building."

There is nothing in the United States Constitution or in any Federal law of which we have knowledge that requires a State to provide a school of law for its citizens. Yet, when the State of Missouri provided a law school for white persons and did not make similar facilities available to colored persons, although the Missouri law did provide for payment of tuition of Negro law students in schools in adjacent States, the Supreme Court held in *Missouri Ex Rel. Gaines v. Canada,* 305 U. S. 337, 83 L. Ed. 208, Mr. Justice Hughes writing the opinion, that such a law constituted a denial of equal protection. He said in part (p. 213):

> "The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it

there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination."

The above case is typical of a great many decisions in the field of equal protection of the laws. For additional cases see:

Westminster School District of Orange County v. Mendez, 161 F. 2d 774 (C. C. A., 9th)—holds that children of Mexican descent may not be denied the right to attend regular schools and cannot be segregated in separate schools.

Lopez v. Seccombe, 71 Fed. Supp. 769 (D. C. So. D. Calif.)—rules that park officials may not deny to persons of Latin blood the right to use park facilities equally with other white persons.

Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212—where a Negress was denied a right to enter a training school for librarians it was held to be a violation of the Fourteenth Amendment.

Johnson v. Hoy, 47 P. 2d 252 (Ore.)—holds that the right to fish is common to all citizens of the State and that the legislature cannot grant to one person or corporation an exclusive right to catch salmon in navigable waters of the State.

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192, 89 L. Ed. 173—rules that a labor union may not exclude Negroes from its membership.

Mitchell v. U. S., 313 U. S. 80, 85 L. Ed. 1201—requires a railroad to furnish substantially equal facilities to all persons.

From the foregoing authorities it is, we submit, established beyond question that the protection of the Fourteenth Amendment is not limited to those so-called rights that have been granted by some express Constitutional provision, Federal or State law, but rather protection is given to one against whom laws are not uniformly applied, regardless of the source of the law. In the language of Mr. Justice Brandeis:

> "Constitutional rights should not be frittered away by arguments . . . technical and unsubstantial. 'The Constitution deals with substance, not shadows. Its inhibitions are leveled at the thing, not the name.'" (*United States Ex Rel M. S. D. Pub. Co. v. Burleson,* 255 U. S. 407, 431, 65 L. Ed. 704, 717.)

The question is not whether by a particular statute a right has been given, but is of the duty of the State when it makes available to its citizens a privilege, to see that the privilege granted is upon the basis of an equality of right. A state need not open its schools as a public forum. No one has the right to force it to do so. The state need not open its schools for social dances. No statute requires it to do so. A state is not required to supply legal training to its residents, and nothing in the Federal Constitution or statutes gives a resident of a state the right to force the state to establish such a school. But once the state determines that it will permit use of schools as public forums, will permit the schools to be used for social dances, will establish law schools for its inhabitants, then it must provide such privileges on a basis of equality of rights. The test is not whether there is a right or a privilege or a permission that is granted. The Constitution deals with things, not with names, and the question is, was

equality of right taken away, and the decisions are uniform that where there is an attempt to do so the Constitution will protect.

It was suggested in the proceedings before the trial court that where a judge opened his courtroom to broadcasting that unless he retained complete discretion as to those stations that might broadcast, he would soon have his courtroom so cluttered with microphones, lines, engineers and other impediments that an intolerable situation might result. But this clearly is not the case here for the complaint alleges (and such allegations must be deemed to be true for purposes of this proceeding) that:

> "KFI had done nothing that would justify Defendant Kenneth E. Morrison to believe that if admitted to his said courtroom it would create a disturbance or do any act or acts that would interfere with the orderly conduct of the trial. In this connection KFI requested of said Defendants Kenneth E. Morrison and KVOE permission to connect its microphone into the wires connecting that of KVOE, which would have been done outside the courtroom and would have eliminated the necessity of KFI's microphone being brought into the courtroom, which permission was denied by said Defendants Kenneth E. Morrison and KVOE without right." [R. 8.]

It is our position that a judge who opens his courtroom to broadcasting may impose such restrictions on the exercise of the right thus conferred as will reasonably be calculated to insure proper courtroom decorum, but in doing so there must be no discrimination among those desiring to avail themselves of that right. For example, a judge might condition his approval to a pooling plan such as that requested by KFI, as above set forth.

Actually the control of broadcasting privileges presents no more practical problems than the control of the public attendance at a trial. Most trials, by law, must be public. The public has a right, therefore, to be present. This right does not mean that 1,000 spectators can crowd into a courtroom that will seat but 100. The judge has the power to control his courtroom and has the right to limit attendance, so long as he does so on a non-discriminatory basis. This is well illustrated by the case of *People v. Tugwell,* 32 Cal. App. 520. Article I, Section 12, of the Constitution of California, requires that criminal trials must be public. In a murder trial, there was a disturbance in the galleries, which the judge ordered the bailiff to suppress. This the bailiff did by clearing the galleries and locking the gallery doors, which doors were kept locked for about 30 minutes. The Court was accessible during this period through the witness door and about 15 spectators remained on the floor of the courtroom. The locking of the door was assigned as a denial of a public trial. The Appellate Court held:

> "There was no discrimination as to the presence of those so permitted to remain. Under these circumstances. we are of the opinion that the trial as conducted did not lose its character in the sense that it was public, as distinguished from a secret or star-chamber trial."

Note the importance placed by the Court on the question of discriminatory selection and the holding that so long as admission to the courtroom was on a non-discriminatory basis the trial would not be affected. Thus, we believe, any

reasonable rule or regulation that is non-discriminatory with reference to broadcasting is the protection to a judge who opens his courtroom to broadcasting. Certainly, he retains all his prerogatives and authority as a judge with full control of his courtroom; he is but charged with the obligation to treat all broadcasters on an equality of right.

B. The Occupation of Gathering News Is a Property Right Which the Courts Will Protect.

The Supreme Court in *International News Service v. Associated Press,* 248 U. S. 215, 63 L. Ed. 211, in an action brought to determine whether news as such had a property value that could be protected from pirating by another news-gathering agency, held:

> "In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right (*Re* Sawyer, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482; *Re* Debs, 158 U. S. 564, 593, 39 L. ed. 1092, 1105, 15 Sup. Ct. Rep. 900); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired (Truax v. Raich, 239 U. S. 33, 37, 38, 60 L. ed. 131, 133, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Brennan v. United Hatters, 73 N. J. L. 729, 742, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881). It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition."

In the present case, appellant is seeking protection from this Court of its right to acquire news, which right the Supreme Court has ruled is as much entitled to protection as the right to guard property already acquired.

Clearly, if a judge acting in his official capacity can grant special favors to one news-gathering agency and can, with impunity deny that same right to other members of the same class, the protection adjudged by the Supreme Court in the *Associated Press* case is not being given.

In *United States Ex Rel. M. S. D. Pub. Co. v. Burleson,* 255 U. S. 407, 432, 65 L. Ed. 704, 718, Mr. Justice Brandeis, citing a long list of cases, said:

> "The right which Congress has given to . . . distribute newspapers and periodicals through the mails is a substantial right. . . . It is of the same nature as, indeed, it is a part of, the right to carry on business which this Court has been jealous to protect against what it has considered arbitrary deprivations."

C. The Actions of Judge Morrison Were Done Under Color of Law.

The acts here complained of were acts of a judge done by him in connection with his official duties as a judge. It is appellant's position that all of such acts were done under color of law, within the meaning of 8 U. S. C. A. 43.

Equal protection of the law applies to judicial action.

> "It is, doubtless, true, that a State may act through different agencies, either by its legislative, its executive or its judicial authorities; and the prohibitions

of the Amendment extend to all action of the State denying equal protection of the laws, . . ."

Ex Parte Virginia, 100 U. S. 313, 25 L. Ed. 667, 669.

See, also:

Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979.

The Constitution of the State of California provides that there shall be a Judicial Department (Article VI, Constitution of 1879). The mere existence of a judiciary carries with it the necessary ancillary authority to supervise the conduct of judicial proceedings and to maintain order and discipline in the courtroom. Section 177 of the California Code of Civil Procedure provides:

"Every Judicial officer shall have power:

"(1) To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty."

The acts of Judge Morrison in the present case were possible only because of his official position as an officer of the State of California and it was only by virtue of the office that he held that he was able to grant to KVOE the right that he denied to KFI. Thus, simply because he was a judge, and only because he was a judge, was Judge Morrison able to deny to KFI the right to broadcast.

Under 8 U. S. C. A. 43:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the juris-

diction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

There have been a great many cases construing the above section, particularly with reference to the phrase "color of law" and the rule as to the meaning of that phrase has become quite well settled.

See:

Picking v. Pennsylvania R. Co., 151 F. 2d 240 (C. C. A., 3rd);

Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835;

Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495;

United States v. Classic, 313 U. S. 299, 85 L. Ed. 1368;

Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510;

Westminster School Dist. of Orange County v. Mendez, 161 F. 2d 774 (C. C. A., 9th).

Perhaps no better summation of the rule is found than that given by this Court in the *Westminster School District* case just cited. In that case suit was brought by fathers of school children of Mexican descent on the grounds that their children had been denied equal protection of the laws of California in that the school board prevented them from attending the ordinary and regular schools and required that Mexican children be segregated in separate schools. The issue in the case was not whether the facilities available for Mexican children were equiva-

lent to those available for white children, but whether the requirement that they use separate facilities did not discriminate and give rise to a cause of action under the Civil Rights Act (8 U. S. C. A. Sec. 43). This Court not only held this segregation to be violative of the equal protection of the law amendment but held the acts of the school board to have been under color of state law even after finding that the acts of the board could not be justified by any state legislation and was in fact *contra* to the legislation of the state. This Court in arriving at this conclusion reviewed the three leading Supreme Court cases on the question of color of law, namely, *Home Telephone & Telegraph Co. v. Los Angeles, Screws v. United States,* and *United States v. Classic* (cited *supra*), and quoted excerpts from these cases. From the *Screws* case:

> "Acts of officers who undertake to perform their official duties are included [by the phrase 'under color of law'] whether they hew to the line of their authority or overstep it."

From the *Classic* case:

> "Misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with authority of State law, is action taken 'under color of' State law."

From the *Home Telephone* case:

> ". . . the subject must be tested by assuming that the officer possessed the power if the act be one which there would not be opportunity to perform but for the possession of some State authority."

Applying the law, then, to the facts as alleged in the present case, it is clear that the acts of Judge Morrison

were possible only because of his official position as an officer of the State of California and it was only by virtue of the authority of his office that he was able to grant a right to KVOE that he denied to KFI.

It was strenuously contended for by counsel for appellees before the District Court that the fact that the State official here involved was a judge resulted in a different rule because of certain common law concepts of the immunities of a judge which bars any suit against a judge for any erroneous decisions that he might have made and that a suit such as the nature of the action here filed cannot be maintained where a judge is a defendant.

At the outset, it should be observed that such an argument carried to its logical conclusion requires its exponents to take the position that a judge, simply because of and by virtue of his office, is above the law and the Constitution, and that because a man is a judge he possesses a special privilege not possessed by other officials. This would be a special privilege that would permit him to deny equal protection of the law, to discriminate arbitrarily in favor of one of a class against others of the same class and to abrogate the Constitutional guarantee of freedom of speech and press. Thus, they must ultimately argue that if the person charged with any of the above violations happens to be a judge engaged in his official duties he is immune. We do not and cannot conceive this to be the law.

We have found but two cases that consider this point from the aspect of violation of the Civil Rights Act:

Picking v. Pennsylvania R. Co., 151 F. 2d 240 (C. C. A., 3rd);

United States v. Chaplin, 54 Fed. Supp. 926 (Dist. Ct. So. Dist. of Calif.).

The *Chaplin* case was a claim of conspiracy to deprive plaintiff of her civil rights. One of the conspirators named was a City Court Judge in Beverly Hills. This case held that where the acts of the judge involved the sentencing of a person after arraignment and plea of guilty, that the common law immunities protected him against suit under the Civil Rights Act.

The *Picking* case holds directly to the contrary. In that case one of the defendants was a Justice of the Peace who was alleged to have denied and refused a hearing to the plaintiff. The Court in holding that a cause of action had been stated against the Justice said:

> "In making this statement we are not unmindful of the absolute privilege conferred by the common law upon judicial officers in the performance of their duties. Pertinent authorities relating to the common law privileges are collected and discussed in United States v. Chaplin, D. C. S. D. Cal. C. D., 54 F. Supp. 926, and in Allen v. Biggs, D. C. E. D. Pa., 62 F. Supp. 229. See also Jennings, Tort Liability of Administrative Officers, Selected Essays on Constitutional Law, Vol. 4, pp. 1271-1274. The absolute privilege was extended even to the conduct of judicial officers dictated by malice. But the privilege as we have stated was a rule of the common law. Congress possessed the power to wipe it out. We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate the privilege to the extent indicated by that act and in fact did so. Section 1 of the third Civil Rights Act explicitly applied to 'any person.' R. S. Section 1979 applies to 'every person.' We can imagine no broader definition. The Statute must be deemed to include members of the state judiciary

acting in official capacity. The result is of fateful portent to the judiciary of the several states. See the statements of Chancellor Kent in Yates v. Lansing, 1810, 5 John, N. Y., 282, 291, 298. But the policy involved is for Congress and not for the courts. Assuming, as we think we must, that the provisions of Section 1 of the Civil Rights Act must be considered with the qualification set out in the last paragraph of footnote 12, *infra,* as in *pari materia* with Section 20 of the Criminal Code under consideration in the Screws case, the conclusion which we have expressed is foreshadowed by that decision, by the Classic case, *supra,* and by the decisions of the Supreme Court in the cases of *Ex Parte* Virginia and Virginia v. Rives, *supra.* For the reasons stated we conclude that the court below erred in dismissing the complaint as to Justice of the Peace Keiffer."

Certiorari was denied by the Supreme Court in the *Picking* case in 92 L. Ed. (Adv. S.) 82.

While the *Picking* case, with the refusal of the Supreme Court to grant certiorari, would seem to settle the rule, we again point out that the acts of Judge Morrison here under review were not judicial acts, that is decisions or rulings made in the process of litigation, but were ministerial or executive acts. Under Section 177 of the California Code of Civil Procedure, a judge is empowered to keep order in his courtroom. His bailiff, of course, has a similar duty. Obviously when the act is ministerial, the common law immunity could not exist.

Ex Parte Virginia, 100 U. S. 339, 25 L. Ed. 676, a civil rights case, held that a judge in selecting a jury was performing a ministerial act and that the question of the common law privilege of immunity for judicial acts of a judge was not before the Court. The Court said:

> "We do not perceive how holding an office under a State and claiming to act for the State can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.
>
> "It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State Judge for his official acts; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc."

It is difficult to believe that the determination of the spectators to a trial can be more judicial in nature than

the selection of the jury to hear the trial, and if selection of jurors is not judicial action there can be no question but that the selection of the spectators is not a judicial act.

Consequently, we submit that there can be no question based on the facts of the present case that the common law rule of immunity to judges for judicial acts is not applicable. Even if we had a judicial act, the rule of the *Picking* case makes such a defense unavailable where suit is brought under the Civil Rights Act.

D. Appellant, a Corporation, Has a Right to Sue for Denial of Equal Protection of the Law and of Freedom of the Press.

Grosjean v. American Press Co., 297 U. S. 233, 80 L. Ed. 660.

In the *Grosjean* case nine newspaper publishers brought suit to enjoin enforcement of an act of the legislature of Louisiana establishing a license tax on newspapers with a publication in excess of twenty thousand. This tax was assailed as being in conflict with the First and Fourteenth Amendments. Suit was filed under 8 U. S. C. A. 43. The Court held:

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment. . . .
>
> "That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgment by State legislation, has likewise been settled by a series of decisions of this Court. . . .

> "Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, as we have held, is not a 'citizen' within the privileges and immunities clauses. . . . But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses which are the clauses involved here."

The Court then held that a cause of action had been stated and that the tax was unlawful.

The gravamen of the case here on appeal is freedom of the press and a denial of equal protection of the law, which brings appellant's case squarely within the jurisdiction of the Federal Courts.

E. A Denial to a News Gathering Agency by a State Official of a Source of News Is an Act of Censorship Forbidden by the First Amendment.

No extensive citations of authorities would seem necessary to establish the self evident fact that if a news agency is denied access to news, there is a most effective censorship of news. Indeed a free source of news is essential to an enlightened people and when sources of news are effectively dammed, there can be no true freedom of the press. The world has just witnessed the tight lid of censorship clamped upon news as applied by the Russian Government in the series of conferences held in Moscow with reference to lifting the Berlin blockade. The World Press was reduced to reporting the progress of the meetings by descriptions of whether the diplomats in attendance looked haggard, cheerful or concerned. This was censorship of news at its source—the most effective of all types of censorship.

If any governmental agency exercises a power of veto over who shall have the right to report the news from such agency, there is a step towards censorship. For example: Suppose a Board of Supervisors is conducting a series of public hearings. Press A has been critical of the conduct of the Board. Press B has been laudatory. If the Supervisors issued an order barring representatives from Press A and giving an exclusive to Press B, is it likely that anything but callow praise will be reported by Press B as to future hearings? This does not lead to free dissemination of ideas and does not develop an informed people, which, we believe, is the basic purpose of the First Amendment. It may be contended that the act of the Judge in the present case in excluding one news agency to favor another was but a little inconsequential thing. But it is from the little tyrannies that larger ones take root and grow and in growing break down the foundations of liberty. (*Thomas v. Collins,* 323 U. S. 516, 89 L. Ed. 430.)

F. A Cause of Action for Conspiracy Was Stated.

This is an issue we will not belabor. If the first cause of action is found by this Court to be good, then it would follow that a cause of action for conspiracy would likewise be capable of being stated. If, and this is not conceded, there are any technical defects in the conspiracy pleading, the action of the trial court should have been to have allowed an amendment and not a dismissal. For to dismiss for a technicality of pleading is an abuse of discretion.

II.

The Causes of Action Stated in the Complaint Are Within the Jurisdiction of the Federal Courts.

Much of the discussion under the preceding topic dealing with the proposition that a cause of action was stated is applicable to the topic here under consideration.

Section 41 of Title 8, U. S. C. A., secures to all equal rights under the law.

Section 43 of Title 8, U. S. C. A., gives a cause of action at law to every person who, under color of any statute, ordinance, regulation, custom or usage of any state subjects or causes to subject another to the deprivation of any rights, privileges or immunities secured by the Constitution and laws.

Section 47 of Title 8, U. S. C. A., gives a cause of action where there is a conspiracy for the purpose of depriving, either directly or indirectly, any person of the equal privileges under the law.

Under Topic I we have discussed the nature of the right involved, establishing, we believe, that a right within the purview of the above referred to section was here violated and equality protection of the laws were denied.

That a District Court has jurisdiction to hear such a case is specifically provided by Sections 1, 8, 12, 13 and 14 of Title 28, U. S. C. A.

It Is Therefore respectfully submitted that a good cause of action was stated, and that this cause of action was within the jurisdiction of the Federal Court.

Surely a Court should be the last place where a state should deny equality of the law and if any branch of the state should be held to a high standard of fairness and impartiality it should be its judicial system.

Respectfully submitted,

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